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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SHAHEEN NATURAL RESOURCES COMPANY, INC.,

Petitioner,

– against –

LA SOCIETE NATIONALE POUR LA RECHERCHE, LA PRODUCTION, LE TRANSPORT, LA TRANSFORMATION ET LA COMMERCIALISATION DES HYDROCARBURES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I

Did the Courts below err in construing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), to which the United States is a party, in such a way as would necessarily remove all Constitutional limitations of the power of the President to make Treaties, other than the concurrence of two-thirds of the Senate?

II

As construed by the Courts below, does the Convention exceed all previously defined concepts as to what matters may properly be the subject of a Treaty?

III

As construed by the Courts below, does the Convention deprive petitioner of its

Constitutional rights to Equal Protection and Due Process of Law?

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Does the Convention permit a construction which does no violence to previously accepted limitations on the Treaty power and does not violate the Constitutional rights of Petitioner?

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Statutes of the United States

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United States Treaties

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Cases Decided by this Court

Altman & Co. v. United States, 224 U.S. 583 (1912) 14

Bolling v. Sharpe, 347 U.S. 497 (1954) 25

City of New Orleans v. United States, 35 U.S. 662 (1836) 15

Doe v. Brandon, 57 U.S. 635 (1853) 18

Fillilove v. Klutznick, 448 U.S. 448 (1980) 25

Foster v. Neilson, 27 U.S. 253 (1829) 13

Geofroy v. Riggs, 133 U.S. 258 (1890) 18

Kolovrat v. Oregon, 366 U.S. 187 (1961) 18

Missouri v. Holland, 252 U.S. 416 (1920) 16,17

Reid v. Covert, 354 U.S. 1 (1957) 18,25

Rocca v. Thompson, 223 U.S. 317 (1912) 15

Rostker v. Goldberg, 453 U.S. 57 (1981) 25

The Cherokee Tobacco, 78 U.S. 616 (1871) 18

The Head Money Cases, 112 U.S. 580 (1884) 13

United States v. Belmont, 301 U.S. 324(1937) 16, 17

United States v. Curtiss-Wright Corp, 299 U.S. 304 (1936) 16

United States v. Pink, 315 U.S. 203 (1945) 16,17

United States v. Wong Kim Ark, 169 U.S. 649, 700 (1898) 18

Scherk v. Alberto Culver Co. 417 U.S. 506 (1947) 43

Decisions of Courts of Appeals

In re Aircrash in Bali, Indonesia, etc., 684 F.2d 1301 (9th Cir. 1982) 15,18,19

Cox v. Fremont County Bldg. Auth., 415 F. 2nd 882 (10th Cir. 1969) 43

Interbras Cayman Co. v. Orient Victory Shipping, etc., 633 F. 2d 4 (2d Cir. 1981) 46

Power Auth. of N.Y. v. F.P.C., 247 F.2d 538, app. dismissed as moot, 355 U.S. 64 (2d Cir. 1957) 15,19

U.S. v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955) 19

Decisions of District Courts

Andros Compania Maritima, S.A. v. Andre & Cie., 430 F. Supp. 88 (S.D. N.Y. 1977) 33

Beromun Aktiengellschaft v. Societe, etc., 471 F. Supp. 1163 (S.D.N.Y. 1979) 46

Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948 (S.D. Ohio 1981) 36

Premier SS Co. v. Embassy of Algeria, 336 F. Supp. 507 (S.D.N.Y.1971) 46

Sanko Steamship, Ltd. v. Newfoundland Refining Company, Ltd., 411 F. Supp. 285 (S.D. N.Y.), aff'd, 538 F.2d 313 (2d Cir.), cert. denied, 429 U.S. 858 (1976) 44

Cases of Other Countries

Compagnia Generale Construzioni S.p.a. v. Piersanti, Court of Appeals, Italy, 6 Y.B. Comm. Arb. 229 (1980) 31

Other Authorities

Aksen, Foreign Arbitral Awards, SW U.L.J. 1, 22 32

38 A. B.A.J. 435 (1952) 17

AM. JUR. 2d, vol 16A, Const. Law § 738 25

Comment, International Commercial Arbitration under the United Nations Convention, etc., 47 Wash.L.Rev. 441, 464 (1972) 33,36

Constitution of the United States of America, Cong. Research Service, Lib. of Cong. (U.S. Govt. P'ting Off. 1973), Sen. Doc. No. 92-82, 92nd Cong. 2nd Sess. 14

Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), reprinted in 63 Am. J. Int. L. 875 (1969), 8 ILM 679 (1969) 39

Federalist, The, No. 75 (Mod. Lib. Ed. 1937) 14

Fordham, The Treaty Power Controversy, 25 Pa. Bar Quart. 274 (1953) 18

5 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1943) 45

Henkin, Foreign Affairs and the Constitution (Foundation Press 1972) 44

Henkin, Note, 63 Am. J. Int'l Law 272 44

House Resolution 91-1181, 1970 U.S. Code & Adm. News 3602 29

Jefferson, Thomas, Manual of Parlimentary Practices 12,20

Looper, Limitations on the Treaty Power in Federal States, 34 N.Y.U.L.Rev. 1045 (1959) 15

Mirasito, United Nations Arbitral Convention, 5 Ga. Jour. of Inter. and Comp. Law 471 (1975) 35

Perlman, On Amending the Treaty Power, 52 Col.L. Rev. 825 (1952) 12,17

Preuss, On Amending the Treaty Making Power: A Comparative Study of the Problem of Self Executing Treaties, 51 Mich. L. Rev. 1117 (1953) 18

Quigley, Accession By the United States to the United Nations Convention, etc., 70 Yale L.J. 1049 (1961) 33

Senate Joint Resolution 130, 82nd Cong. 2d Sess. (1952) 17

Southerland, Restricting the Treaty Power, 65 Harv. L. Rev. 1305 (1952) 18

Saunders, Commentary on UNCITRAL ARBITRATION RULES, 4 Y.B. Comm. Arb. 172, 178 (1979) 43

Vierdag, The Law Governing Treary Relations between Parties to the Vienna Convention on the Law of Treaties and States Not Party to the Convention, 76 Am. J. Int. L. 779 (1982) 24a-24c,39

Walton, RUSSELL ON ARBITRATION (19th Ed. 1970) 43

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LA SOCIETE NATIONALE POUR LA RECHERCHE, LA PRODUCTION, LE TRANSPORT, LA TRANSFORMATION ET LA COMMERCIALISATION DES HYDROCARBURES,

Respondent.

PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of

Appeals for the Second Circuit in the action entitled La Societe Nationale Pour La Recherche, etc. vs. Shaheen Natural Resources Company, Inc.,

OPINIONS BELOW

The Memorandum Order, without opinion, of the United States Court of Appeals for the Second Circuit and the opinion of the United States District Court for the Southern District Court have not yet been reported. Both are set forth in full in Appendix A and B hereto, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 by reason of the fact that the United States Court of Appeals has erroneously construed Article II, § 2 of the Constitution of the United States and the decisions of this Court thereunder.

The date of the judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed is May 11, 1984.

STATEMENT

This action was commenced in the United States District Court, Southern District of New York, on January 24, 1983, by respondent ("Sonatrach") against petitioner, Shaheen Natural Resources Company, Inc. ("Shaheen") an Illinois corporation with its principal office in New York seeking judgment on an arbitration award by the International Chamber of Commerce in Geneva, Switzerland, in favor of Sonatrach.

Jurisdiction was invoked under 9 U.S.C.§ 201, which was enacted in 1970 to effectuate the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention")

The arbitration arose out of a contract between Sonatrach, the national oil company of Algeria and Shaheen dated June 1, 1974 ("Contract")for the sale of crude oil produced in Algeria to Newfoundland, Canada.

It is important that the Court recall, and judicially take notice, that this was less than nine months after the Arab-Israeli war of October 1973, and immediately following the lifting of the Arab Oil Embargo, when the world was still in a crisis situation, with world crude oil prices having risen from $2.00 to $20 per barrel. The OPEC oligopoly was at the peak of its newly found power, and there was no contractual bargaining, only "take it on OPEC's terms or you don't get it."

Sonatrach claimed non-paymentfor certain quantities of crude oil shipped

under the Contract and damages for failure to perform the balance of the contract. By several telexes Shaheen admitted liability, but informed Sonatrach that the "refinery's bankers" would not release the money.1/

Prior to the commencment of the arbitration proceeding, Sonatrach had, on July 16, 1976, commenced a civil action on the same claims in the Supreme Court, New York County. Shaheen moved to dismiss, on the ground that the action was barred by New York Business Corporation Law § 1312, in that Sonatrach was doing business in New York, but was not licensed to do business.

Discovery was ordered, and after a long delay in responding to Shaheen's discovery demands, Sonatrach, on April 7, 1978, commenced the arbitration.

Shaheen then filed, in the State Court, an answer, counterclaim and mo-

tion for summary judgment, alleging that, by filing the action, Sonatrach had waived arbitration.

The New York Court denied summary judgment, holding that Algerian law applied to the question of election of remedies, and that under that law Sonatrach had not waived arbitration; the Court also held that the Federal Arbitration Act (9 U.S.C.1, et seq.) did not apply as there was no interstate commerce involved.

Shaheen interposed a jurisdictional objection to the arbitration proceedings on the ground of waiver, but did not otherwise participate in the arbitration.

On March 19, 1982, the arbitration award was entered.

Thus, by its legal maneuvers, Sonatrach has tranformed an action in the

New York Court on an undisputed claim into a purported "claim" under the auspices of the Convention, to which Sonatrach's parent, the Government of Algeria, did not see fit to become a party.

Proceedings Before the District Court

Sonatrach filed its complaint in the District Court; Shaheen moved to dismiss the complaint on the grounds, inter alia that the Convention could not be construed so as to permit its invocation by a citizen of, or a state agency of, a non-party thereto; if the Convention were construed so as to permit it to be invoked by a citizen of a non-party against a citizen of the United States, it would violate the equal protection and due process clauses of the Fifth Amendment to the Constitution.

In summary, petitioner argued that this was a "heads you win, tails I lose"

situation; had petitioner participated in the arbitration and prevailed, petitioner could not, as a matter of right, have invoked the Convention against Sonatrach in the Courts of Algeria, since Algeria is not a signatory to the Convention. Moreover, the fact that the Algerian Courts might enforce a foreign arbitration award against Sonatrach (a point which was by no means clear), under Algerian law did not answer the equal protection and due process questions; only "two-way" rights of enforcement, equality on both sides, would suffice.

Petitioner further argued that the Convention's specific provisions require a construction which does no violence to Constitutional principles.

Decision of the District Court

The District Court held (separately stated and numbered for emphasis):

[A] With respect to the construction of the Convention:

> "...[t]he unambiguous language of the Convention ...provides that the Convention applies to arbitral awards made in the 'territory of a State other than the State where the recognition and enforcement of such awards are sought.'...The focus of this article...is not on the nationality of the party seeking to enforce an award but on the situs of the arbitration...."(B 19).2/

[B] With respect to the Constitutional argument:

[1] "This reciprocity argument is wholly without merit and is not a ground stated in the Convention upon which enforcement can be denied." (B Id.)

[2] "...[I]t appears that Algerian courts would in fact enforce an ICC arbitral award rendered in a signatory country regardless of the nationality of the parties."(Id.)

[3] "...Shaheen signed the contract containing the arbitration clause and cannot now seek to avoid the consequences...." (Id.)

[4] "...Shaheen had an opportunity to contest the arbitration provision at the time that that the panel held its hearing. Its failure to do so before the ICC panel waives this ground...." (B 20)

The District Court entered judgment on the arbitration award (B 31-32)

Decision of the Court of Appeals

The Court of Appeals did not address any of the points raised in the Court below as it affirmed in a Memorandum Order without opinion (A.1-2).

REASONS FOR GRANTING THE WRIT

I

The Construction of the Convention by the Court Below Removes all Constitutional Limitations on the Treaty Power of the President, Other than the Concurrence of Two-Thirds of the Senate,

as it

A. Exceeds all Previously Accepted Concepts of What a Treaty May Properly Encompass,

and

B. Permits a Treaty to Confer Rights on Citizens of Non-Parties Thereto in Derogation of the Constitutional Rights of United States Citizens.

A. What is a "Treaty" and What Matters May a "Treaty" Properly Address?

Only 41 words in the entire Constitution are devoted to the Power of the President to "make Treaties" (Art. II, Sec. 2), the legal effect of treaties made in the exercise of such power ("the supreme law of the land"; Art. VI, Cl. 2), and the jurisdiction of the Federal Courts to hear cases arising under them

(Art. III, Sec. 1, Cl. 1) (For a general review of the history of the Treaty provisions and their applications, See Perlman [Solicitor General of the United States], On Amending the Treaty Power, 52 Col. L. Rev. 825 (1952) from which this Petition has liberally drawn.

Nowhere in the Constitution is there even a hint of what constitutes a "Treaty", as that term is used therein.

From that, it might be fairly concluded that there was no doubt in the minds of the framers of the Constitution as to what was encompassed in the term "Treaty", as they used it.

Such does not appear to have been the case, however. Thomas Jefferson, in his Manual of Parlimentary Practices, said of the treaty making power:

> "To what subjects this power extends has not been defined in detail by the Constitution; nor are we entirely agreed among ourselves" (emphasis added).

Jefferson went on to say, however, that

> "It is admitted that it must concern the foreign nation party to the contract, or it would be a mere nullity, res inter actos acta...."3/

It is the idea expressed by Jefferson which lies at the heart of the lower Court's [mis]interpretation of the Convention: As so interpreted, **does the Convention meet any accepted definition of what constitutes a "Treaty" as that term appears in the Constitution ?**

The idea expressed by Jefferson that a Treaty is no more than a contract between nations would appear to have become the accepted definition. Foster v. Neilson, 27 U.S. 253, 314 (1829) ("...a contract between two nations..." per Marshall, C.J.); The Head Money Cases, 112 U.S. 580, 598 (1884) ("...a compact between independent nations... [which] may confer certain rights upon

the citizens or subjects of one of the nations residing in the territorial limits of the other...); Altman & Co. v. United States, 224 U.S. 583, 600 (1912)(...a compact made between two or more independent nations with a view to the public welfare."); The Federalist, No. 75 (Mod. Lib. Ed. 1937), p. 486 ("...agreements between sovereign and sovereign...")

The treaty power of the President has survived every one of the challenges made against its use, even though, on occasion, treaties have been construed in a manner which avoided constitutional problems. See Constitution of the United States of America, Cong. Research Service, Lib. of Cong. (U.S. Govt. P'ting Off. 1973), Sen. Doc. No. 92-82, 92nd Cong. 2nd Sess., pp. 495-96), which cites, as examples of judicial construc-

tion to avoid constitutional problems, City of New Orleans v. United States, 35 U.S. 662 (1836) and Rocca v. Thompson, 223 U.S. 317 (1912); see also, In re Aircrash in Bali, Indonesia, etc., 684 F.2d 1301, 1310 (9th Cir. 1982) where the Court sua sponte raised a question as to the Constitutionality of the Warsaw Convention, which has been in effect for fifty years, and then, by construction, avoided the Constitutional question by holding that the plaintiff had a remedy under the Tucker Act for the "taking" of plaintiff's property by operation of the Warsaw Convention; Cf. Power Auth. of N.Y. v. F.P.C., 247 F.2d 538, app. dismissed as moot, 355 U.S. 64 (2d Cir. 1957), (Senate reservation of "purely domestic" matter in treaty held unconstitutional), and Looper, Limitations on the Treaty Power in Federal States, 34 N.Y.U.L.Rev. 1045 (1959).

In Missouri v. Holland, 252 U.S. 416 (1920), this Court held that the treaty making power was not limited by the Xth Amendment to the Constitution.

In United States v. Curtis-Wright Corp., 299 U.S. 304, 318 (1936) and United States v. Belmont, 301 U.S. 324 (1937) the Court recognized and approved "executive agreements", which were held not to require senate concurrence.

Then came United States v. Pink, 315 U.S. 203, 228 (1945), in which this Court stated

> "The Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov Assignment."

The Litvinov Assignment was the "executive agreement" approved in Belmont.

In the view of many writers on Constitutional law (more often implied than stated), the holdings in Missouri v.

Holland, Belmont and Pink concerning the scope of the Presidential treaty making powers, coupled with the United States joining the United Nations, gave rise to the "Bricker Amendment" (Senate Joint Resolution 130, 82nd Cong. 2d Sess. (1952), and its companion amemdment sponsored by the American Bar Association (see 38 A.B.A.J. 435 (1952)) which proposed limitations on the treaty power.4/

The Constitutional debates in Congress that followed and the writings of the authorities on the subject, all concerned the Constitutional limitations, or lack thereof, on the Presidential power to make treaties. The treaty making power survived that challenge, but only after many strong positions had been taken that Presidential power was not unlimited. Perlman, On Amending the Treaty Making Power, 52 Col.L.Rev. 825

(1952); Southerland, Restricting the Treaty Power, 65 Harv. L. Rev. 1305 (1952); Preuss, On Amending the Treaty Making Power: A Comparative Study of the Problem of Self Executing Treaties, 51 Mich. L. Rev. 1117 (1953); Fordham, The Treaty Power Controversy, 25 Pa. Bar Quart. 274 (1953).

Indeed, this Court has stated in many decisions, that the treaty making power of the President is limited, and may not contravene any provisions of the Constitution. Doe v. Brandon, 57 U.S. 635, 656 (1853); The Cherokee Tobacco, 78 U.S. 616, 620 (1871); Geofroy v. Riggs, 133 U.S. 258, 267 (1890); U.S. v. Wong Kim Ark, 169 U.S. 649, 700 (1898); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Reid v. Covert, 354 U.S. 1 (1957) (plurality opinion); see also, In Re Air Crash in Bali, Indonesia, etc.,

684 F.2d 1301, 1310 (9th Cir. 1982); Power Auth. of N.Y. v. F.P.C., 247 F.2d 583 (2d Cir.), app. dismissed as moot, 355 U.S. 64 (1957); U.S. v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955).

In the light of all of such precedents surely the President, in causing the United States to accede to the Convention, which deals with the relatively noncontroversial 5/ subject of enforcement of foreign arbitral awards, did not intend that the Convention be interpreted in such a manner as would, in effect, establish that the President has totally free and unfettered power to enter into any treaty for any purpose whatsoever, without regard to any provision in the Constitution.

First, it would appear that, except for the Convention, there has never been

a treaty entered into by the United States which [as interpreted by the Court below] conferred rights or benefits on citizens of nations **other than the parties to the treaty.**

As Thomas Jefferson stated:

> "It is admitted that it [a treaty] must concern the foreign nation party to the contract, or it would be a mere nullity, res inter alios acta...."

The critical point about the Convention, and the Constitutional problem created by the construction thereof by the Court below, is that the focus of the convention is not on the rights of nationals of the parties to the convention, but on the situs of the arbitration proceeding (B 19).

Thus, under such construction, if the citizens of one or two non-signatory nations meet and hold a purely private arbitration in a hotel room located in a

signatory country, say Switzerland, before an arbitration panel composed entirely of citizens of non-signatory countries, about matters which occurred entirely in a non-signatory country, the prevailing party could invoke the jurisdiction of the United States Courts for the enforcement of the award.6/

What possible interest could the United States, or Switzerland, the situs of the arbitration, have in such a matter ?

Citizens of neither country, nor any rights relating to any of their citizens, were in any way involved.

No property located in, nor property of citizens of, either country was involved.

Neither the sanctity nor the enforcement of the laws of either country was involved.

No courts, judicial processes, of-

ficers nor administrative proceedures of either country was involved.

In plain point of fact, neither Switzerland nor the United States has any ligitimate interest whatsoever in the matter; but both have, according to the Court below, conferred the right upon a stranger to invoke their judicial processes, take up the time of their courts, and use their judicial systems to enforce the award against another stranger.

In the case at bar, petitioner Shaheen 7/ executed a contract in Algeria with Sonatrach for the purchase of crude oil in Algeria, which was destined, and restricted by the contract for delivery solely to, an oil refinery in Newfoundland, Canada. No interstate or foreign commerce was involved, and the only legitimate interest of the United States

in the matter was the fact that Shaheen was a United States corporation.

Under such circumstances, we respectfully submit, the treaty power of the United States may not be used in favor of Sonatrach, an agency of the governmentof Algeria, which has refused to accede to the Convention, against the only United States interest in the matter.

James Madison, in response to a suggestion that the President and the Senate might do something against the interest of the people of the United States, said:

> "It is to be presumed that, in transactions with foreign countries, those who regulate them will feel the whole force of native attachment to their own country. The contrast being between their own nation and a foreign nation, is it not presumable they will, as far as possible, advance the interest of their own country?" Quoted in Perlman, op. cit. supra.p. 842.

It certainly could not fairly be said that granting, by treaty, greater rights to a citizen of a non-signatory thereto than to a citizen of the United States, a signatory, meets Madison's test.

In summary, Thomas Jefferson, described as "no friend of the Treaty Power", and Professor Henkin, an advocate of virtually unlimited treaty power, appear to agree, a valid treaty must concern the parties to the contract, and some matter in which they or the citizens thereof have a legitimate interest.

By no stretch of the imagination could the United States, or the other parties to the Convention, be deemed to have a **legitimate** interest in a proceeding where the rights of non parties to the Convention are in issue.

Putting aside for the moment the Constitutional problem created by such an interpretation of the Convention, it is beyond doubt a violation of firmly established principles of international law which have been recognized by the United States and the United Nations. That is, both the United States and the United Nations have recognized that to permit any treaty to be invoked by a non-signatory against a signatory is a violation of the international law of treaties.

This principle of established international law was codified in the U.N. sponsored Vienna Convention on the Law of Treaties (UN Doc. A/CONF.39/27 (1969), reprinted in 63 Am. J. Int. L. 875 (1969), 8 ILM 679 (1969):

> "A treaty does not create either obligation or rights for a third state [i.e. a non-signatory] without its consent." (Article 34)

That Article has been described as reflecting the "general rule of the law of treaties that treaties do not bind third states", and explained as "constituting codification in the strictest sense of the term" (Vierdag, The Law Governing Treaty Relations Between Parties to the Vienna Convention on the Law of Treaties and States Not Party to the Convention, 76 Am. J. Int. L. 779, 787-788 (1982).

The United States participated in the drafting of the Vienna Convention (Id. at 781) but has not yet ratified it; however, there can be little doubt that the the United States representative participated in the drafting of Article 34, and that the United States agreed with the principle of international law set forth in Article 34.

Dr. Vierdag commented on Article 34 of the Vienna Convention as follows:

(1) "Obviously, this rule applies to the Convention [on the Law of Treaties] itself."

(2) "The party that is bound by the Convention cannot invoke it against the other party both under Article 34 and under the general rule of international law; and the latter state [i.e. the non-signatory] cannot invoke it against the former under the general rule of international law. (emphasis added).

Where the United Nations has recognized, as a part of the Law of Treaties, that a treaty can only be invoked by, as well as against, a signatory (or one who has "consented" to be bound thereto), surely the same principle must, as a matter of treaty interpretation, be read into other treaties and conventions promulgated by the same world body.

As pointed out below, Article XIV of the Covention, when read in the light of Article 34 of the Vienna Convention on the Law of Treaties, compels only one proper interpretation. The Convention, as any other treaty or convention, can be invoked only by a signatory, and a non-signatory has no rights or obligations thereunder.

B. The Violation of Petitioner's Constitutional Rights to Equal Protection and Due Process of Law.

This Court has "imported" the rights granted by the XIVth Amendment to equal protection of the laws, relating to the states, into the Vth Amendment, which relates to the actions of the Federal Government. Bolling v. Sharpe, 347 U.S. 497 (1954); Rostker v. Goldberg, 453 U.S. 57 (1981); Fullilove v. Klutznick, 448 U.S. 448 (1980).

Presumably such protection applies to actions taken by the President under the treaty power. Reid v. Covert, 354 U.S. 1 (1957)(plurality opinion).

The Equal Protection right has been summarized as follows:

> "All persons will be treated alike under like circumstances and conditions both under the privileges conferred and the liabilities imposed." 16A AM. JUR.2d Const. Law § 738.

Here, there are two parties to the

Contract, one a State Agency of a member of OPEC, then the most powerful and effective international oligopoly seen in modern times, the other a United States company which needed oil for its refinery in Newfoundland. Crude oil was, in mid-1974, in short supply, due to the Arab Israeli war and resultant Arab/OPEC boycott imposed on those nations who happened to be friendly with Israel. The bargaining positions of the two parties to the Contract could hardly be called equal.

Nonetheless, the Court below held that in signing the Contract presented to it to sign [or else, no oil] Shaheen had waived its Constitutional right to equal protection of the laws, and therefore was in no position to complain that the jurisdiction of the United States Courts was being invoked against it under the Convention by the OPEC member

which would not deign to sign the Convention which it now invokes.

Surely, this was not what James Madison meant when he said that the President and the Senate presumably would "advance the interest of their own country" when entering into a treaty.

If the decision of the District Court is allowed to stand, we respectfully submit, any United States citizen who is a party to an international bargaining situation with a national of a non-signatory to the Convention has been placed at a distinct disadvantage, unless the United States party has absolute domination over the bargaining. The national of the non-signatory can insist on arbitration in Switzerland, certainly not unreasonable on its face, and the United States party, if he agrees (because of ignorance of the

Convention and how it can be used against him, lack of bargaining position or otherwise) will be faced with the identical problem that faced Shaheen, i.e., "Heads you win, tails I lose".

Under the reading of the Convention by the District Court, the national of the non-signatory can, if it prevails, invoke the convention in any signatory country; if the national of the non-signatory loses, it is at least sure the treaty cannot be invoked against it in its own country, where, possibly, all of its assets are located.8/ Surely this places the interests of nationals of non-signatories above the interests of nationals of signatories.

We respectfully submit that such result does not carry out the purpose expressed by the Congress:

> "In the Committee's view, the provisions of S. 3274 will serve the best interest of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts." HR 91-1181, 1970 U.S. Code & Adm. News 3602.

Certainly the Convention had that result for Sonatrach; it did not do the same for Shaheen, the only U.S. party concerned.

II

A Fair Reading of the Convention Achieves A Sensible Result that Does No Violence to Any Provision in the Constitution.

The District Court held, in effect, that the Convention could be invoked by Sonatrach, an agency of a non-signatory, because the "unambiguous" provisions of the Convention so provide.

We respectfully submit that the Convention lends itself to a far more sensible interpretation, which is conso-

nant with the Constitutional principles discussed herein.

The Convention leaves a great deal to be desired by way of draftmanship. It is, at best, muddled and internally inconsistent.

For example, Article II, § 3 of the Convention provides that when a court of a signatory is seized of a case involving an agreement covered by the Convention it shall refer the parties to arbitration

> "...unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Article V sets forth the grounds upon which the courts of a signatory may refuse to recognize and enforce an arbitration award covered by the Convention.

The difficulty between those two provisions is that the grounds for not ordering arbitration are stated differ-

ently from the grounds for non-recognition ("incapacity" of a party; "agreement is not valid"; involves "a difference not contemplated by or not falling within the terms of the submission to arbitration").

Thus, a party who could prove he had every defense ennumerated for non-recognition of the award would, nonetheless, be forced to suffer an order to arbitration, and after the award was rendered then, and only then, raise the Article V defenses. That is, unless they are the same things differently stated, which is certainly far from clear.

The Italian Courts have sensibly included the Article V defenses into the Article II § 3 grounds for not ordering arbitration. Compagnia Generale Construzioni S.p.a. v. Piersanti, Court of Appeals, Italy, 6 Y.B.Comm. Arb. 229

(1980).

Article II has also been critized for failure to specify whose law applies to the grounds for not ordering arbitration. Aksen, Foreign Arbitral Awards, 3 SW U.L.J. 1, 22 ("...it is entirely possible that each country will apply its own standards of local law...").

Still another patent flaw lies in Article II. Where the parties to the arbitration agreement are both nationals of signatory countries, and the arbitration is (by oversight or otherwise) specified in a non-signatory country, a court of a signatory country if seized with a case involving such contract, is faced with the dilemma that

> "...although...the Convention would apply to agreements to arbitrate in a country not a party to the Convention, they would not apply to the recognition and enforcement of the resulting awards made in these non-signatory countries." Comment, International Commercial

> Arbitration under the United Nations Convention, etc., 47 Wash.L.Rev. 441, 464 (1972).

See also, Andros Compania Maritima, S.A. v. Andre & Cie., 430 F. Supp. 88 (S.D. N.Y. 1977); Quigley, Accession By the United States to the United Nations Convention, etc., 70 Yale L.J. 1049, 1063 (1961).

The author of the Washington Law Review Article, with obvious disregard of the sancity of the Convention as part of the "supreme law of the land", proposed a solution to the the delimma - which he termed "absurd" - the Convention should be "construed" as not applying to the pre-arbitral proceedings or the post-abitral enforcement proceedings, the provisions of the Convention to the contrary notwithstanding.

We now turn to the provisions of the Convention which the District Court found to be "unambiguous" (B 19).

Article XIV provides that:

> "A Contracting State may not avail itself of the present Convention against the other Contracting States except to the extent that it itself is bound to apply the Convention."

In the first place, as the drafters of the Convention should have known, the Convention does not lend itself to being "availed" upon by a Contracting State. It is designed to be utilized for the benefit of parties to arbitration agreements.

Thus, to make any sense at all, Article XIV must be construed in some manner.

We respectfully suggest that the most sensible construction would be along the lines of the following

> "A national of a Contracting State may not avail himself [or herself or itsself] of the present Convention except to the extent that the country of the party seeking to invoke the Convention is itself bound to apply the Convention."

Such construction is suggested by Mirasito, United Nations Arbitral Convention, 5 Ga. Jour. of Inter. and Comp. Law 471 (1975).

However, that construction necessarily negates the reading by the District Court that the

> "The focus of this article...is not on the nationality of the party seeking to enforce an award but on the situs of the arbitration...."(B 19).

However, If the "focus" is truly on the situs of the arbitration, and not the nationality of the parties, then Article XIV, to be harmonious with that concept, would have to be interpreted to read

> "Parties who provide for an arbitration forum in a Contracting State may not avail themselves of the present convention in the courts of the other Contracting States except to the extent that the forum is bound to apply the Convention."

That tortured construction points up the falacy upon which the District Court's interpretation rests. Certainly

language in the Convention appears to place its focus on the situs of the arbitration, but, as we have pointed out above, when other "absurd" results were perceived from a literal reading of other parts of the Convention it was construed so as to apply in a sensible manner.

Here it is obvious that the drafters meant that no nation would have to "give more than it received", i.e., the national of one signatory could ask for no better than his country was prepared to give. See Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948 (S.D. Ohio 1981).

It would not only be "absurd" (to use the words of the Washington Law Review Comment, p. 33 supra,), it would be inane to interpret the Convention as dealing with "forum vs. forum" in the

most favored nations treatment, when the only persons who have any interest whatsoever in the outcome are the parties to the arbitration.

Certainly no one, other than, apparently, the Court below, could really beleive that Switzerland gave **one wit** as to the outcome of the Sonatrach/Shaheen arbitration.

It is Article XIV, properly construed, which shows what was intended, and indeed the only interpretation that makes sense:

(a) The courts of signatories will not accord the petitioning nationals of other signatories any greater rights to enforcement of arbitral awards than the courts of such petitioning national grant to nationals of other signatories.

(b) Having put that limit on the extent the courts of a signatory will go to accomodate nationals of other signa-

torys, the courts of a signatory most certainly are not going to grant <u>unlimited</u> rights of enforcement to the nationals of non-signatories ! Under the District Court's "forum" not "nationality" construction, the nationals of a non-signatory to the Convention would be sure to get better treatment from the courts of signatories than would the nationals of other signatories.

That would indeed be an "Alice in Wonderland" result.

(c) The only logical position regarding the nationals of non-signatories, and the only way the United Nations is likely to get any more countries to acceed to the Convention (presumably that was the objective), is to not accord the nationals of non-signatories any standing under the Convention.

This is precisely what Rule 34 of the Convention on the Law of Treaties provides

> "A treaty does not create either obligation or rights for a third state [i.e. a non-signatory] without its consent."

The United States participated in the drafting of the Convention on the Law of Treaties (UN Doc. A/CONF.39/27 (1969), reprinted in 63 Am. J. Int. L. 875 (1969), 8 ILM 679 (1969), but has not yet ratified it; certainly its principles are well suited to a solution of the problem in the instant case.

Dr. Vierdag (Vierdag, The Law Governing Treary Relations between Parties to the Vienna Convention on the Law of Treaties and States Not Party to the Convention, 76 Am. J. Int. L. 779, 787 (1982)) has stated the principles under the Convention on the Law of Treates, as well as under general rules of international law, as simply as possible:

(1) "Obviously, this rule applies to the Convention [on the Law of Treaties] itself."

(2) "The party that is bound by the Convention cannot invoke it against the other party both under Article 34 and under the general rule of international law; and the latter state [i.e. the non-signatory] cannot invoke it against the former under the general rule of international law. (emphasis added).

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination on a date certain to be therein named, a full and complete transcript of all proceedings, of the case on its docket number 83-9078 entitled La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialsation Des Hydrocarbures, against Shaheen Natural Resources Company, Inc.; and that the Order of the United States Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises at to

this Court may seem just and proper.

Dated: New York, New York
August 7, 1984

Respectfully submitted,

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FOOTNOTES

1. Throughout the proceedings, Shaheen argued that there was nothing to arbitrate as the liability was admitted, but that such funds were due by Newfoundland Refining Company, for whom Shaheen had been acting as disclosed agent, rather than Shaheen. At no time did Shaheen ever contest the existence of the Contract, the obligation to pay for the crude oil lifted, or the liability to pay therefore. As the eminent English arbitration authority has said "To constitute a proper submission [to arbitration], there must be a difference. If there is no difference there is nothing for an arbitrator to arbitrate about..." Walton RUSSELL ON ARBITRATION (19th Ed. 1970), p. 45; see also, Cox v. Fremont County Bldg. Auth., 415 F. 2nd 882 (10th Cir. 1969); Cf. Saunders, Commentary on UNCITRAL ARBITRATION RULES, 4 Y.B. Comm. Arb. 172, 178 (1979) ("...the words "controversy or claim' were added...to avoid possible doubt as to the scope of the term 'dispute',e.g., whether it includes cases where the validity of the claim is fully recognized...").

2. The Court below elsewhere cited (B 16) this Court's recognition and approval of the Convention in Scherk v. Alberto Culver. Co, 417 U.S. 506 (1974), and numerous lower court decisions applying the Convention to or against citizens of non parties to the Convention (B. 20). Scherk involved a dispute between citizens of the United States and Germany, both parties to the Convention, which, of course, did not there present to this Court the questions here

present to this Court the questions here presented; in not one of the cases cited by the Court below, nor in any other reported decision dealing with the Convention has there been a challenge to the Constitutionality of the Convention.

3. Professor Henkin, perhaps one of the most ardent advocates of unlimited treaty making power (See Note, 63 Am. J. Int'l Law 272) and Jefferson, described by Henkin as "no friend of the Treaty Power" agree on this point: "A treaty, then, must be a bona fide agreement between states, not a 'mock marriage,' nor a unilateral act by the United States to which a foreign government lends itself as an accomodation in order to bring it within the United States Treaty Power...." Henkin, Foreign Affairs and the Constitution (Foundation Press 1972), pp. 140143. See also, Geoffery v. Riggs, 133 U.S. 258, 267 (...any matter which is properly the subject of negotiations with a foreign country...").

4. It is of interest that the fears expressed by the supporters of the limitation did not differ materially from those voiced in the debates preceding the Constitution. Patrick Henry, in addition to being concerned with "liberty or death", was concerned with treaties "infringing our liberties", to which the reply was given that no treaty could be made which was repugnant to the spirit of the Constitution. See Perlman, op.cit.supra, p. 443, fn.102.

5. Petitioner supports arbitration under fair and equal terms to both parties. See, e.g. Sanko Steamship, Ltd.

v. Newfoundland Refining Company, Ltd., 411 F. Supp. 285 (S.D. N.Y.), aff'd, 538 F.2d 313 (2d Cir.), cert. denied, 429 U.S. 858 (1976), where petitioner forced the plaintiff there, a Japanese company, to proceed to arbitration in England. The contract there was covered by the Convention, and equally available to both parties, as Japan, England and the U.S. are signatories.

6. To carry this concept to its absurd extreme, if the United States and Switzerland can, by treaty, grant to Algerian nationals access to U.S. courts to invoke the provisions of such treaty, why could not the same two countries, by such a "treaty", confer rights upon nationals of Afganistan to become citizens of the United States ? See, e.g. 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 5 (1943), quoting Elihu Root "...under a pretense of exercising the treaty making power, the president and the senate might attempt to make provisions regarding matters...which would only be a colorable - not a real - exercise of the treaty making power.

7. In the Court below, Shaheen urged that it acted only as agent for the owner of the Newfoundland refinery, as the contract provided that the crude oil purchased thereunder "...shall be consigned exclusively to the Buyer's installations." If the 'Buyer" was Shaheen, it had no "installation" as it was, to the knowledge of Sonatrach, solely a holding company. Both parties agreed that the crude oil was destined for the Newfoundland refinery, which was not owned by Shaheen, but by a sub-subsidiary thereof. The Court refused to

entertain such a defense, on the ground that it should have been presented to the arbitration panel, though the stated law by the Second Circuit in such a situation, is that the Court, not the panel decides who is the proper party to the arbitration contract. Interbras Cayman Co. v. Orient Victory Shipping, etc., 633 F.2d 4 (2d Cir. 1981) (the contract there involved was covered by the Convention, though not mentioned in the opinion); Beromun Aktiengesellschaft v. Societa, etc., 471 F. Supp. 1163 (S.D.N.Y. 1979) (rule applied in case where Convention was held applicable).

9. The Court below considered it sufficient that in an affidavit supplied by plaintiff, whose State chose not to acceed to the Convention, it was stated that Algeria's courts had, in one cited case, affirmed a foreign arbitration award [whether for or against the Algerian national was not stated]. Attached to the same affidavit was an article on Algerian law which stated that "the Courts may be tempted to go into the merits of the case." Moreover, it appears that Algeria does not, under its law, consider an arbitration clause as waiving sovereign immunity. See Premier SS Co. v. Embassy of Algeria, 336 F. Supp.507 (S.D.N.Y. 1971). Of course, enforcment under Algerian law is not equivalent to enforcment under the Convention, or there is no point to having a Convention at all.

APPENDIX

Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

For the Second Circuit

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No. 1147 -- August Term 1983

Argued May 9, 1984 Decided May 11, 1984

Docket No. 83-9078

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LA SOCIETE NATIONALE POUR LA RECHERCHE, LA PRODUCTION, LE TRANSPORT, LA TRANSFORMATION ET LA COMMERCIALISATION, DES HYDROCARBURES,

Plaintiff-Appellee,

--v.--

SHAHEEN NATURAL RESOURCES COMPANY, INC.

Defendant-Appellant.

-----x-----

BEFORE:

FEINBERG, Chief Judge,
WINTER, Circuit Judge,
and LASKER, District Judge.*

-----x-----

* Honorable Morris E. Lasker, Senior United States District Judge for the

Order of the Court of Appeals

Southern District of New York, sitting by designation.

Appellant argues primarily that the enforcement of an arbitration award, pursuant to 9 U.S.C. § 207, by appellee would violate the due process and equal protection clauses because appellee is owned by an arm of a foreign government that is not a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See 9 U.S.C. §§ 201-208.

Affirmed.

-----x-----

RICHARD deY. MANNING, New York, NY, for Defendant-Appellant.

ALFRED FERRER III, New York, NY (Sherman & Sterling, Of Counsel), for Plaintiff-Appellee.

-----x-----

PER CURIAM:

The judgment of the district court is affirmed for the reasons set forth in Judge Duffy's Memorandum & Order of November 23, 1983, reported at ___F. Supp. ___(S.D.N.Y. 1983).

Opinion of District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LA SOCIETE NATIONALE POUR LA RECHERCHE, LA PRODUCTION, LE TRANSPORT, LA TRANSFORMATION ET LA COMMERCIALISATION DES HYDROCARBURES, Plaintiff	:	83 CIV 0676 (KTD)
-against-	:	MEMORANDUM & ORDER
SHAHEEN NATURAL RESOURCES COMPANY, INC., Defendant.	:	

APPEARANCES;

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Opinion of District Court

KEVIN THOMAS DUFFY, D.J.:

Plaintiff, La Societe Nationale Pour La Recherche, La Production, Le Transport, La Transformation et la Commercialisation Des Hydrocarbures ("Sonatrach") seeks an order confirming an arbitration award rendered by a three-member International Chamber of Commerce ("ICC") panel on November 27, 1981 in Geneva, Switzerland. Defendant Shaheen Natural Resources Company, Inc. ("Shaheen") moves pursuant to 9 U.S.C. § 207 to dismiss the plaintiff's complaint on the ground that the arbitral award on which the complaint is based is not entitled to recognition and enforcement under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 U.S.T. 2517, T.I.A.S. No. 6997, as implemented by

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sections 201 to 208 of the Federal Arbitration Act, 9 U.S.C. § 201-08 (1976 Supp.) [hereinafter the "Convention"]. Defendant has moved alternatively, should plaintiff's complaint not be dismissed, for a stay of the arbitration award's enforcement pending the filing of an answer by the defendant. I deny defendant's motions and the arbitration award is confirmed pursuant to Article IV of the Convention.

FACTS

Plaintiff, Sonatrach, is a company owned by an arm of the Algerian Government. The defendant is an Illinois corporation with its principal place of business in New York. On June 1, 1974, a written contract was entered into between Shaheen and Sonatrach providing for the sale to Shaheen of 273,000

metric tons of crude oil to be shipped over a seven month period. The contract between the parties contained an arbitration clause that provided:

> Any dispute arising out of this Contract shall be permanently settled according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbiters named in accordance with these Rules.
>
> The arbitration shall take place in Geneva.
>
> The law in force in Algeria is applicable for the settlement of any dispute.

Contract, Article 19 (June 1, 1974) (translation), Affidavit of Mohammed Bayou, Exh. A [hereinafter the "Contract"].

A dispute under the contract arose when the full payment for the second cargo shipped to a refinery operated by a subsidiary of Shaheen in Come-By-Chance, Newfoundland was not remitted to

Sonatrach. After demanding that Shaheen effect a cure, Sonatrach notified Shaheen on September 25, 1974 that the contract was considered repudiated.

On July 16, 1976 Sonatrach instituted a breach of contract action against Shaheen in the Supreme Court, New York County. Shaheen was notified on April 7, 1978 that Sonatrach also had commenced an arbitration proceeding before the ICC in accordance with the arbitration clause in the contract. Shaheen moved for summary judgment in the state court action arguing that by commencing an action in state court before proceeding to arbitration, Sonatrach had waived its right to have the dispute arbitrated. On July 28, 1978 the New York Supreme Court denied summary judgment. The court held that Alge-

rian law, not New York law, applied to the waiver issue and that under Algerian law, the commencement of a court action does not waive the right to arbitrate if the other party has not yet served its answer in the court suit. Defendant appealed to the Appellate Division, First Department but on October 23, 1978 the lower court's judgment was affirmed.

In accordance with the rules of the ICC, the terms of reference to the arbitration panel were drafted at a meeting held in Paris on February 28, 1980 and signed on March 7, 1980. Shaheen did not appear at this meeting to sign the document or submit any papers or pleadings to the panel other than an affidavit for the purpose of contesting the jurisdiction of the panel. Shaheen again argued that the ICC panel lacked

jurisdiction because Sonatrach had waived its right to arbitrate by instituting the state court action on the same claim in New York.

In the arbitration award rendered on November 27, 1981, the panel found that it had jurisdiction to hear the dispute and therefore rejected the defendant's defense. The panel ultimately found in favor of the plaintiff. Specifically, the arbitration panel found that a valid and binding contract was entered into between Shaheen and Sonatrach on June 1, 1974 and that pursuant to the contract's arbitration clause, Algerian law applied to the dispute. The panel found that Shaheen accepted only a portion of the oil delivered to its refinery and that full payment including late payment penalties was not

made to the plaintiff.1/ The panel held therefore that the plaintiff had a right to cancel the contract based on the defendant's breaches. Damages were calculated by the panel to exceed four million dollars with interest accruing on part of the award.

DISCUSSION

The Convention provides that "within three years after an arbitral award falling under the convention is made,any party to the arbitration may apply . . . for an order confirming the award as against any other party to the arbitration." 9 U.S.C. § 207. Article IV of the Convention requires only that an "authenticated original award or a duly certified copy thereof" and the original agreement to arbitrate be supplied to the court in order to obtain recognition

of the award. Convention, Article IV, 9 U.S.C. § 201. Plaintiff has submitted the documents necessary to obtain confirmation.

The power to review an arbitration award is limited under the Convention, see Amoco Overseas Oil Co. v. Astir Navigation Co., 490 F. Supp. 32, 37 (S.D.N.Y. 1979), and the burden of proving that an award should be overturned is on the party challenging the enforcement and recognition of the award, see Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d 334, 336 (5th Cir. 1976). Section 207 provides that "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207.

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Article V provides that recognition and enforcement may be refused only in certain narrowly prescribed situations.2/

In addition, the Convention permits recognition to be refused on two additional bases; if the subject matter of the difference is not capable of settlement by arbitration or if the recognition of the award would be contrary to the public policy of the country where recognition is sought, then recognition and enforcement may be refused. Convention, Article V, subsection 2, 9 U.S.C. § 201. See Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974).

A. Shaheen's Liability

Shaheen asserts that it is not liable under the contract and is there-

fore not bound by the arbitration award because it acted merely as an agent for its subsidiary, Newfoundland Refining Company, Ltd. ("NRC"). Shaheen argues that the agency was disclosed because Sonatrach knew that it is a holding company without any refining facilities and that the crude oil was to be refined at a facility operated by NRC. Shaheen points to clause 12.1 of the contract which provides: "The crude oil covered by this Contract shall be consigned exclusively to Buyer's installations." Contract at 11. There are two reasons why I find Shaheen's argument unpersuasive. First, Shaheen should have presented its objection to the arbitration panel and failing to do so, has waived it. Second, even if Shaheen's objection is now properly interposed, there is

no merit to it.

Shaheen was properly notified of the arbitration proceeding yet contested the jurisdiction of the panel only on the basis that the plaintiff waived the right to arbitrate by commencing an action in state court. Defendant had an affirmative obligation to raise "any arguments why the arbitration should not proceed" to the panel, United Steelworkers of America, AFL-CIO CLC v. Smoke-Craft, Inc. 652 F.2d 1356, 1360 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982), including that it is not a party to the agreement and is not bound by the arbitration provision. Shaheen chose not to do so. See also American Broadcasting Co. v. Ali, 489 F. Supp. 123, 127 (S.D.N.Y. 1980) (decision of arbitrators is final and binding uon the

parties when proceeding was adequate under the agreement). Thus, I find that Shaheen's objection to confirmation on the ground that it was acting only as an agent to NRC is not properly raised at this time and therefore has been waived. Assuming arguendo that Shaheen has not waived this objection to the enforcement of the arbitration award, I find the objection unpersuasive. That Shaheen was merely acting as an agent for NRC and as such is not bound by the agreement to arbitrate is contradicted by the unambiguous language contained in the agreement.

The party claiming that it is an agent has the burden of proving it and generally, the self-serving statements of the purported agent are insufficient. See Tarstar Shipping Co. v. Century

Shipline, Ltd., 451 F. Supp. 317, 323 (S.D.N.Y. 1978), aff'd, 597 F.2d 837 (2d Cir. 1979); see generally 2 S. Williston, A Treatise on the Law of Contracts § 295, at 374 (3d ed. 1959). Here, Shaheen's argument is contradicted by the unambiguous terms of the contract. The first paragraph of the contract identifies the parties as Sonatrach (the "seller") and Shaheen (the "buyer"). Contract, at 1. Moreover, the last page of the contract is signed by Albin W. Smith, the Senior Vice President of Shaheen. Contract, at 16. Nowhere in the contract is it stated that Shaheen was acting on behalf of NRC. Clause 12.1 is susceptible to interpretations other than that suggested by the defendant; it alone is not sufficient to sustain Shaheen's burden of showing that

it was acting for a disclosed principal. Moreover, it was assumed throughout the pleadings and affidavits submitted to the New York Supreme Court as well as the decision rendered by that court that Shaheen was a party to the contract.3/

B. Public Policy

Shaheen asserts that confirmation of the foreign arbitration award would violate United States public policy. See Article V, subsection 2, 9 U.S.C. § 201. Shaheen argues that Article 12 of the contract, which provides that the crude oil covered by this Contract shall be consigned exclusively to Buyer's installations," is a per se violation of the antitrust laws as an illegal location restriction on the resale of goods.

The public policy defense under the Convention is generally construed nar-

rowly in order to promote the Convention's goal of encouraging the prompt enforcement awards. See Scherk v. Alberto Culver Co., 417 U.S. 506, 520 n.15, reh'g denied, 419 U.S. 885 (1974); Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969,974 (2d Cir. 1974). A defense based on public policy must touch "the forum state's most basic notions of morality and justice." 508 F.2d at 974. Here, the defendant's antitrust argument fails to reach the standard contemplated by the Convention.

Antitrust arguments interposed as a defense to a contract action, especially an action for an unpaid purchase price, traditionally have been viewed with disfavor. See Kelly v. Kosuga, 358

U.S. 516, 158 (1959); Viacom International, Inc. v. Tandem Productions, Inc, 526 F.2d 593, 597 (2d Cir.1975). The Supreme Court in Kelly v. Kosuga reasoned that where "a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement." 358 U.S. at 521. Thus, the "successful interposition of antitrust defenses is too likely to enrich [Shaheen] who reap[ed] the benefits of a contract and [now] seeks to avoid the corresponding burdens." 526 F.2d at 599.

Further, assuming that the antitrust argument be deemed sufficient to

constitute a violation of our policy, defendant has misstated the applicable law. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59 (1977), the Supreme Court overruled United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375-76 (1967), the authority cited by Shaheen in support of its public policy argument. In Continental T.V., Inc. v. GTE Sylvania, Inc., the Supreme Court held that a rule of reason approach should be applied to vertical resale restrictions. 433 U.S. at 59. It is unnecessary, at this point, to apply the rule of reason analysis to the given facts in order to determine whether clause 12.1 of the contract violated the Sherman Antitrust Act. The defendant's public policy defense to the enforcement of the award is rejected.

C. Sonatrach's Standing

Shaheen argues that Sonatrach may not invoke the Convention against Shaheen because as an arm of the Algerian government, Sonatrach is not a party to the Convention4/ Shaheen's reasoning is inconsistent with the unambiguous language of the Convention which provides that the Convention applies to arbitral awards made in the "territory of a State other than the State where the recognition and enforcement of such awards are sought." Convention, Article 1, 9 U.S.C. § 201. The focus of this article to the Convention is not on the nationality of the party seeking to enforce an award but the situs of the arbitration. Indeed, arbitration awards rendered by panels sitting in contracting countries have been confirmed consistently when

the plaintiff is a national of a country which has not acceded to the Convention. See Imperial Ethiopian Government v. Baruch-Foster Corp, 535 F.2d 334, 335 (5th Cir. 1976) (arbitration award obtained by Ethiopian government, not a signatory to Convention, confirmed); Jugometal v. Samincorp., Inc., 78 F.R.D. 504, 505 (S.D.N.Y. 1978) (arbitration award obtained by Yugoslavian Corporation and rendered in France confirmed; Yugoslavia is not a signatory to the Convention but France is). Here, the arbitration hearing took place in Switzerland, a signatory country. Thus, Sonatrach has properly invoked the Convention and is entitled to recognition and enforcement of the award rendered by the ICC panel.

Opinion of District Court

D. Enforcement Against Shaheen

Shaheen also argues that the due process clauses of the Fifth and Fourteenth Amendments would be violated by the enforcement of the award because an award, if it were in Shaheen's favor, would not be enforced against Sonatrach in Algerian courts. This reciprocity argument is wholly without merit and is not a ground stated in the Convention upon which enforcement can be denied. In addition, it appears that Algerian courts would in fact enforce an ICC arbitral award rendered in a signatory country regardless of the nationality of the parties. See Affidavit of Mohand Issad (translation), at 4-5. In addition, Shaheen signed the contract containing the arbitration clause and cannot now seek to avoid the consequences

of its acquiesence to the arbitration provision in the contract. Last, Shaheen had an opportunity to contest the invocation of the arbitration provision clause at the time that the panel held its hearing. Its failure to do so before the ICC panel waives this ground. Thus, the enforcement of this arbitration award rendered in Sonatrach's favor against Shaheen does not violate the Fifth and Fourteenth Amendments to the Constitution.

E. Miscellaneous Procedural Objections to Enforcement

Shaheen argues that there was no "dispute" to be arbitrated because the amount due on the contract was never contested and that arbitration was therefore improperly invoked. I find, however, that the arbitration clause was

properly invoked by Sonatrach. Shaheen's circular argument is frivolous and without support. First, Shaheen concedes a liability in the approximate amount of 1.8 million dollars. Yet, the arbitration panel computed Shaheen's liability to exceed 4 million dollars. Second, Shaheen's failure to honor its debt constitutes a dispute subject to resolution through arbitration.

A number of other procedural deficiencies are cited by Shaheen as defenses to the enforcement of the arbitration award. Shaheen argues that the award is fatally defective because three arbitrators sat on the panel in contravention of the agreement to arbitrate and the ICC Rules. Although this is an objection properly raised under Article V of the Convention, it is an objection

more appropriately asserted to the arbitration panel itself. In addition, it apears that there is no merit to this objection. The contract provides that any dispute arising between the parties "shall be permanently settled according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbiters named in accordance with those Rules." Affidavit of Mohammed Bayou, Exh. A, at 15. The Rules of Conciliation and Arbitration of the International Chamber of Commerce provide that "[w]here the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators." Affidavit of Richard deY.

Manning, Exh. H, at 11. By letter dated June 12, 1978, the Secretary General of the ICC Court of Arbitration informed the parties that the dispute would be submitted to an arbitration panel comprised of three members. See Affidavit of Alfred Ferrer III, Exh. C. Thus, it appears that the decision to have an arbitration panel consisting of three members was made properly and in accordance with the contract and the Rules of the ICC.

Finally, Shaheen asserts that the award was procedurally defective because the award was not rendered by the panel within the time limits set forth in the ICC Rules. The rules provide that the award should be made within six months of the date that the terms of reference was signed. Affidavit of Richard deY.

Manning, Exh. H, at 19. Shaheen has waived its objection to the alleged untimeliness of the award by failing to object to the delay at the expiration of the initial six-month period. See Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co., 484 F. Supp. 1063, 1066 (N.D. Ga. 1980) (citing Lodge No. 725, International Association of Machinists v. Mooney Aircraft, Inc, 410 F.2d 681, 683 (5th Cir. 1969)). Shaheen has not raised this objection before the panel or prior to the instant motion and is therefore estopped from raising it now.

Even assuming that this objection is properly profferred at this time, it appears that the ICC Rules were complied with. The terms of reference were agreed to on May 7, 1980 and the award

was signed on November 15, 20, and 27, 1981. The ICC Rules provide, however, that the ICC Court of Arbitration may extend this time period within which the award shall be rendered. Id. It would appear that the time limits prescribed by the rules within which an award should be rendered were extended in accordance with those rules on four occasions. See Affidavit of Alfred Ferrer III, Exh. C. Shaheen may not now assert its defense to the enforcement of the award based on the delay of the panel in rendering the award.

F. Enforcement Under Algerian Law

Shaheen, in its final argument against the enforcement of the award, is grasping for straws. Shaheen contends that under the applicable Algerian law, Sonatrach, as a state-owned company, is

not entitled to enter into an agreement to arbitrate disputes. Shaheen has misinterpreted the documents submitted on Algerian law to serve its own purpose. It is apparent from the affidavits submitted by Ali Bencheneb and Mohand Issad, professors of Algerian law, that the restriction on agreements to arbitrate applies only to domestic disputes. This dispute arises out of an international contract and as such, is clearly arbitrable and would be governed by the ICC Rules and the Convention. See Affidavit of Ali Bencheneb, at 3-4; Affidavit of Mohand Issad, at 2-3.

CONCLUSION

To deny recognition and enforcement to the arbitration award rendered on November 27, 1981 at this stage would be to violate the goal and the purpose of

the Convention, that is, the summary procedure to expedite the recognition and enforcement of arbitration awards. See Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d at 335. Shaheen had an opportunity to raise its objections to the arbitration proceedings before the panel and did not do so. Moreover, several of its objections are not interposable under Article V of the Convention. There is no basis, in fact or law, to support its motion to dismiss the plaintiff's petition to confirm the award rendered in its favor by the ICC panel. Thus, the defendant's motion to dismiss is denied, and the arbitration award is hereby confirmed. Defendant's application for a stay of the enforcement of the award pending the service of an answer by Shaheen in the

state court action is also denied. Judgment is directed to be entered on the arbitration award forthwith.

SO ORDERED.

DATED: New York, New York
November 15, 1983

KEVIN THOMAS DUFFY, U.S.D.J.

Opinion of District Court

FOOTNOTES

1. The panel found the following breaches by the defendant:

(a) The defendant did not proceed with the removal of the crude oil which had been agreed upon;

(b) The defendant did not notify the plaintiff of the removal schedule for September and October 1974;

(c) The defendant was in arrear in the payment of the balance due on the cargo removed in July; and

(d) The plaintiff had notified the defendant that it considered the failure of the latter to comply with its contractual obligations to constitute a unilateral repudiation of the contract. Arbitration Award (translation), Affidavit of Alfred Ferrer III, Exh. A, at 29.

2. The Convention provides that recog-

nition may be denied upon proof that:

(a) The parties to the agreement . . . were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected...or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration...or

(d) The composition of the arbitral authority or the arbitral procedure

was not in accordance with the agreement of the parties...or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Convention, Article V, 9 U.S.C. § 201.

3. Shaheen argues that as an agent for a disclosed principal, it is not liable under the contract that was signed by the vice president of Shaheen. The general rule is that an agent who either purports to be the principal or who acts for an undisclosed principal is liable under the contract. See Powers v. Coffeyville Livestock Sales Co., Inc., 665 F.2d 311, 312-13 (10th Cir. 1981); Trarolli Lumber Co., Inc. v. Andreassi, 59 A.D.2d 1011, 399 N.Y.S.2d 739, 740

(4th Dep't 1977). On the other hand, an agent acting on behalf of a disclosed principal will not be liable on the contract. Id. Here, even if Shaheen has sustained its burden of establishing the existence of an agency relationship it has not shown that the principal was disclosed at the time of the making of the contract.

4. Shaheen's objection to enforcement based on the fact that Algeria is not a signatory to the Convention is not a ground to deny recognition under the Convention. See supra note 2.